

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL REICHERT,

Defendant-Appellant.

UNPUBLISHED

February 5, 1999

No. 206909

Kent Circuit Court

LC No. 96-014041 FH

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and was sentenced to nine months in jail and thirty-six months of probation. He now appeals as of right. We reverse and remand for a new trial.

I

This case stems from the brutal assault of Brandon Davis by defendant and his brother. The information charging defendant with felonious assault alleged that defendant

did make an assault upon BRANDON DAVIS, with a dangerous weapon, to-wit: BEER BOTTLE, but without intending to commit the crime of murder or to inflict great bodily harm less than the crime of murder. . .

At trial, the trial court permitted the prosecution to argue that defendant's shoes could also be found to be a dangerous weapon in support of this charge. The court similarly instructed the jury that it must decide whether "the beer bottle and/or shoes in question here were dangerous weapons." On appeal defendant argues that the trial court's instruction, which effectively amended the information to allege that defendant used a shoe as a dangerous weapon during the assault, constitutes error requiring reversal. We agree.¹

A trial court has broad discretion in determining whether to permit an amendment to the information. *People v Potts*, 44 Mich App 722, 727; 205 NW2d 864 (1973). Generally, a trial court

may amend an information at any time to correct any defect, imperfection or omission, or to conform with the evidence presented at trial, as long as the accused is not prejudiced by the amendment. MCL 767.76; MSA 18.1016. After a careful review of the record, we find no evidence that defendant was wearing footwear at all, let alone footwear that could constitute a dangerous weapon. Because the evidence presented at trial does not support the amended charge, reversal of defendant's conviction is required. Cf. *People v Hunt*, 442 Mich 359, 364-365; 501 NW2d 151 (1993) (where testimony at preliminary examination supported the new charge, Court proceeded with analysis of whether the amendment of information prejudiced the defendant).

II

Defendant also argues that the prosecution presented insufficient evidence to sustain his conviction of felonious assault using a beer bottle. We disagree. Our review of the record reveals sufficient evidence from which a trier of fact could find that, even if defendant did not personally hit the victim with a bottle, he aided and abetted his brother in doing so. *People v Lawton*, 196 Mich App 341; 492 NW2d 810 (1992). Accordingly, we remand this case for a new trial.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey

¹ Defendant argues that the amendment of the information was erroneous because of a lack of notice. We disagree, because defendant was present for a preliminary examination at which the district court opined that defendant's foot could constitute a dangerous weapon. See *People v Newson*, 173 Mich App 160; 433 NW2d 386 (1988). Nonetheless, as discussed above, we find the amendment requires reversal on other grounds.